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June 15, 2005

Honorable Pat Miller, Chairman  
Tennessee Regulatory Authority  
ATTN: Sharla Dillon, Dockets  
460 James Robertson Parkway  
Nashville, TN 37243-5015

Re: Petition of Frontier Telecommunications, Inc. for Declaratory Ruling; Docket No  
04-00379

Dear Chairman Miller:

Enclosed for filing in the above-captioned docket please find the original and 13 copies of the Reply Brief of Ben Lomand Rural Telephone Cooperative, Inc. to the Initial Brief of Frontier Communications of America, Inc.

Thank you for your assistance. If you have questions, please do not hesitate to contact me.

Sincerely,



H. LaDon Baltimore  
Attorney for Ben Lomand Telephone  
Cooperative, Inc.

LDB/dcg

Enclosures

cc. Guilford Thornton, Jr., Esq.  
Melvin Malone, Esq.

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IN RE: )  
)  
PETITION OF FRONTIER )  
COMMUNICATIONS, INC. )  
FOR DECLARATORY RULING ) DOCKET NO. 04-00379

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**REPLY BRIEF OF BEN LOMAND RURAL TELEPHONE COOPERATIVE, INC.  
TO THE INITIAL BRIEF OF FRONTIER COMMUNICATIONS OF AMERICA, INC.**

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Ben Lomand Rural Telephone Cooperative, Inc. ("Ben Lomand Cooperative"), by and through its undersigned counsel, respectfully files this Reply Brief to the Initial Brief of Frontier Communications of America, Inc. ("Frontier") filed in this matter on June 8, 2005.

**I. ARGUMENT**

**A. Tenn. Code Ann. §65-29-130 does not confer jurisdiction over this matter to the Tennessee Regulatory Authority.**

The Tennessee Regulatory Authority has limited jurisdiction over telephone cooperatives, including Ben Lomand Cooperative. Tenn. Code Ann. §65-4-101(6)(E) excludes telephone cooperatives from the jurisdiction of the TRA. An exception to this exclusion is contained in Tenn. Code Ann. §65-29-130. This code section limits the jurisdiction of the TRA over telephone cooperatives to the "**sole and specific purposes ... [of] (1) the establishment of territorial boundaries; (2) the hearing and determining of disputes ... relative to and concerning territorial disputes. ...**" Tenn. Code Ann. §65-29-130(a) (emphasis added)

As set forth in Ben Lomand Cooperative's Initial Brief, Section II(A), this matter is not a territorial or boundary dispute. In this matter Frontier is not asking the TRA to determine where

a boundary is but rather asking that the TRA determine that no boundaries exist at all between the parties.

Frontier cites Opinion No. 90-83 of the Office of the Attorney General as bestowing jurisdiction on the TRA in this matter. However, the Opinion did not address the issue in this matter. Rather, the Attorney General addressed the question of what jurisdiction the TRA has if a telephone cooperative which has been granted a franchise by a municipality wishes to offer service in such municipality which already has service provided by another telecommunications service provider. The Attorney General opined that the municipality alone cannot grant authority to the telephone cooperative, but that the TRA had limited authority under Tenn. Code Ann §65-29-130 and §65-29-102 to determine if the municipality did or did not have "reasonably adequate telephone service" which would prohibit the telephone cooperative's entrance into the municipality. That is not the question in this matter.

Frontier also argues that its original CLEC authority, as evidenced by its certificate of convenience and necessity issued June 27, 1996 confers jurisdiction<sup>1</sup>. The intervening cooperatives have ably addressed this issue in their Preliminary Brief wherein it was pointed out when such CCN was issued, Frontier did not have the authority to go into the territory of telephone cooperatives.<sup>2</sup>

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<sup>1</sup> See, *In Re Application of Citizens Telecommunications Company, d/b/a Citizens Telecom for a Certificate of Convenience and Necessity*, Docket No 96-00779

<sup>2</sup> See, *Preliminary Brief of the Intervening Cooperatives*, pp 2-5

**B. Tenn. Code Ann. §65-29-102 does not confer jurisdiction on the TRA in this matter, nor does it allow Frontier to offer service in Ben Lomand Cooperative's territory.**

Tenn. Code Ann. §65-29-102 provides for the establishment of telephone cooperatives in areas where "there shall be no duplication of service where reasonably adequate telephone service is available." This statute is to provide for the purpose of telephone cooperatives: furnish telephone service in rural areas. This statute does not confer jurisdiction upon the TRA for any reason other than to determine if an area does not have reasonably adequate telephone service in order for a telephone cooperative to offer service in such area. The Tennessee Attorney General Opinion cited by Frontier (Op. No. 90-83) reiterates this statutory purpose and TRA jurisdiction. In such Opinion, the Attorney General opines that the TRA has jurisdiction to determine if "reasonably adequate service is available" in order for a telephone cooperative to offer service in a municipality which already has telephone service. That is a far different issue from the one in this matter.

Frontier also cites a Montana case as conferring jurisdiction in this matter.<sup>3</sup> In Intermountain, the Montana Public Utility Commission and the Montana Supreme Court held that a statute, similar to Tennessee's, which conferred authority on telephone cooperatives to compete in other telephone companies' areas where there is "no reasonably adequate service" available, was upheld. The issue was whether or not another telephone company was providing "reasonably adequate service" or not providing such service, to determine if a telephone cooperative could offer service in the other telephone company's area. Again, this is a far different issue from the one in this matter.

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<sup>3</sup> See, *Frontier Communications of America, Inc 's Brief Addressing Issues in Pending Motion to Dismiss*, p 4, citing Intermountain Telephone & Power Company v Dept. of Public Service Regulation, 201 Mont 74, 78, 651 P2d 1015, 1017 (Mont 1982)

**C. Tennessee law regarding cooperatives is not preempted by 47 U.S.C. §253(a).**

It is the position of Ben Lomand Cooperative that this issue is not a "threshold issue" (a threshold issue is whether or not the TRA has jurisdiction in this matter). However, Ben Lomand Cooperative will briefly address this issue now due to the fact that Frontier has raised the matter, and, in the event the TRA determines that this is a "threshold" issue. By so doing, Ben Lomand Cooperative does not waive any arguments or defenses not set forth herein and reserves the right to further address this issue if necessary.

The TRA does not have the jurisdiction to determine if the 1996 Telecommunications Act preempts state law. The issue of preemption of Tenn. Code Ann. §§65-29-102, 65-29-130, or any other statute or regulation is an issue to be determined by the Federal Communications Commission ("FCC"). 47 U.S.C. §253. Preemption must be considered by the FCC in the process of a hearing, with notice and opportunity for public comment. 47 U.S.C. 243(d).

**II. CONCLUSION**

For the foregoing reasons, the Tennessee Regulatory Authority should deny Frontier's petition in its entirety.

Respectfully submitted,



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### Certificate of Service

The undersigned hereby certifies that on this the 15<sup>th</sup> day of June, 2005, a true and correct copy of the foregoing has been forwarded via first class U. S. Mail, hand delivery, overnight delivery, or facsimile transmission to the following.

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